



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITALE**

**CRIMINAL CASE NO. 5 OF 2016**

**REPUBLIC.....PROSECUTOR**

**VERSES**

**DENNIS KEMBOI NAIBEL.....ACCUSED**

**JUDGEMENT**

1. The accused herein was charged with the offence of **Murder contrary to Section 203 as read with Section 204 of the Penal Code**. The particulars of the charge were that **on the 16<sup>th</sup> March 2016 at Kaptega farm in Chepchoina, within Trans Nzoia County murdered SN**.
2. The accused denied the charge and the prosecution called several witnesses to prove its case. The accused was placed in his defence where he gave unsworn evidence and did not call any witnesses. Before looking at the merits or otherwise of the matter it shall be appropriate to summarise the evidence as presented during trial.
3. **PW1 Inspector Gift Mutama** testified that he was the Investigating Officer in this matter as well as the Officer in Charge of Suam Police Station. He said that he was called on the morning of 16<sup>th</sup> March, 2016 at around 8.00 am by one Ronald a Kenya Police Reservist who told him of a rape incident at a village called [particulars withheld].
4. He went with his colleague and found the deceased bleeding and in bad shape. They took her to Anderson hospital. While with her, she told him of how the accused who was her neighbour at home came at night and attacked her using a panga. He also raped her and thereafter assaulted her using the panga and left her to die. She said that she pretended to have died and in the morning she called for help. The deceased unfortunately died while undergoing treatment at the said hospital and her body was brought to Kitale District Hospital mortuary.
5. The witness produced the deceased's written dying declaration as an exhibit in court.
6. **PW2 Dr. Okumu Moses** produced the post mortem report on behalf of Dr. Obala who opined that the cause of death was cardiorespiratory arrest secondary to flail chest. There were also injuries seen on her vulva and other parts of the body.
7. **PW3 NM** testified that she knew the accused who was her neighbour. That she runs a shop and that on 16<sup>th</sup> March, 2016 at around 8.00 am the accused was with his wife at her shop where he told her that, "that woman had died." She said that she told him in Sabaot language which although she did not speak she understood. The wife gave him kshs. 300 and told him to go through the forest. Later Kenya Police Reservist came looking for him and arrested his wife.
8. When placed on his defence the accused in his unsworn evidence said that on the 15<sup>th</sup> March, 2016 he went to Kapsogkwony to plough and plant his land. He went to PW4's shop where he got some change of kshs. 1000 and gave his wife kshs. 300. He said that while he was busy at Kapsogkwony planting, three people came and arrested him and others and took them to Kapsokwony Police Station. They were later taken to Suam Police poast where the rest were released and he was instead charged with the offence of murder instead of being in possession of illicit brew. He did not call any other witness.

**ANALYSIS AND DETERMINATION**

9. The parties after the close of the case were ordered to file written submissions which they complied and the court has perused the same and there is no need to reproduce them here. Suffice to state that the Counsel for the accused submits that there was no eye witness to the incident and that the identification was not possible given the circumstances, namely, that the incident took place at night.
10. The State Counsel has argued that his case was watertight considering the facts and the evidence so far presented. He said that all the ingredients of murder were proved and specifically malice aforethought.
11. The court taking into consideration the evidence on board is of the considered opinion that the whole thrust of the prosecution case lies

on the dying declaration by the deceased. The same was produced by PW1 and he said that he was told by the deceased before she died.

12. The law on dying declaration was well captured by the Court of Appeal in *Choge Vrs. Republic (1985) KLR 1* where it was held that:

***“The general principle on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at the point of death and the mind is induced by the most powerful considerations to tell the truth. In Kenya, however, the admissibility of a dying declaration does not depend upon the declarant being at the time of making it, in a hopeless expectation of imminent death. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in the reception into evidence of such a declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person”***

13. Taking cue from the above, I have read the dying declaration produced by PW1 very well. The same shows and explains graphically what transpired that night. It is noted that by the time the deceased was rescued she was still in her good state of mind though in pain. Despite the ordeal she went through overnight, she survived to tell what happened.

14. Although the incident took place at night the assailant spend quality time with the deceased and being a neighbour, a fact which has not been disputed, she must have been in a position to see and hear him very well. The deceased from the evidence on record did not die immediately but several hours later while undergoing treatment.

15. PW3 stated that the accused in her presence told the wife that the woman had died. At that time PW3 did not know whom they were referring to but learn later that it was the deceased.

16. The line of evidence taken by PW3 was consistent with the accused defence where he stated that he was with his wife at PW3's shop and that's where he gave her Kshs.300. That amount was what was witnessed by PW3 as well. Although she was not a Sabaot speaker she said that she understood the language.

17. The unsworn defence was not of much probative value as the prosecution did not have the chance to cross examine him. There was every probability that the accused after sexually assaulting the deceased saw that the best thing to do was to eliminate her. In essence there was malice aforethought which is a critical ingredient in a murder offence.

18. The accused did not bother to call any witness to corroborate what he was doing at the time of his arrest. There was nothing to show that he was arrested because he was found with illicit alcohol or at all. His defence was a sham.

19. In the premises I find that based on the dying declaration produced and the evidence of pw3, the accused was responsible for the assault against the deceased which eventually led to her death. The accused is hereby convicted under the provision of Section 203 of the Penal Code.

**Dated, signed and delivered in open Court at Kitale this 6<sup>th</sup> day of June, 2019.**

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**H.K CHEMITEI**

**JUDGE**

**6/6/19**